

In the Supreme Court of the  
United States

OCTOBER TERM, 1977

No. .... **77-1298**

LAWRENCE S. KRAIN,

*Petitioner,*

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation;

CHARLES YOUNG, individually and as Chancellor of the  
University of California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and as Dean of the  
University of California at Los Angeles  
School of Medicine;

DAVID H. SOLOMON, individually and as Chairman of the  
Department of Medicine of the University of California  
at Los Angeles School of Medicine;

RONALD M. REISNER, individually and as Chairman of the  
Division of Dermatology of the University of California  
at Los Angeles Medical Center,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Ninth Circuit

**Brief for Respondents in Opposition**

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### Brief for Respondents in Opposition

Respondent Regents of the University of California, et al., oppose the petition of Lawrence S. Krain for a writ of certiorari to review the judgment and opinion of the

United States Court of Appeals for the Ninth Circuit entered in this case on December 19, 1977.

### **OPINION BELOW**

The memorandum opinion of the court of appeals appears in full in the Appendix of the petition for writ of certiorari.

### **QUESTION PRESENTED**

Did the United States District Court abuse its discretion by refraining to exercise concurrent jurisdiction where the plaintiff had elected to file suit in state court first, the parties were identical, no federal proceedings beyond the filing of the complaint had occurred, and all of plaintiff's causes of action in his federal suit had, in substance, been raised and were capable of being litigated in the state court?

### **STATEMENT OF THE CASE**

Petitioner is a former medical resident in the Division of Dermatology, University of California, Los Angeles, School of Medicine (UCLA). He was appointed as a Resident I for his first year on July 1, 1971 and reappointed on July 1, 1972 as a Resident II for a second year. However, due to serious problems with his clinical performance during his first two years, he was not offered a third year residency.

Petitioner then left UCLA and accepted a fellowship at Massachusetts General Hospital, but later, after being terminated from that appointment, renewed his complaints against UCLA. These complaints included his demand that he be given an administrative hearing to determine the propriety of UCLA's failure to appoint him as a third year resident. Such a hearing was held for five days in March and April of 1974, and the result was that the three

member hearing committee ruled that petitioner was not entitled to reinstatement as a third year resident.

On July 1, 1974, petitioner filed his complaint in Los Angeles Superior Court based upon a number of legal theories including alleged deprivation of due process and applied for a temporary restraining order to compel his readmission to UCLA as a medical resident and to prohibit certain alleged defamatory statements pending the outcome of the trial. On that date the application for the temporary restraining order was denied and a date set for hearing on his application for a preliminary injunction. After the hearing, the superior court denied the application for a preliminary injunction by order dated July 26, 1974 and on September 20, 1974 plaintiff appealed from that order.

While the appeal from the denial of his preliminary injunction was pending, petitioner proceeded with his action in the state trial court and, on March 19, 1975, filed a certificate of readiness summarizing the action as one for breach of contract, fraud, violation of civil rights, and injunction.

On July 1, 1975 the plaintiff filed the federal court action with which this petition for writ of certiorari is concerned. Petitioner requested relief on six counts: (1) declaratory judgment; (2) denial of civil rights; (3) taking of property without due process; (4) denial of equal protection of the laws; (5) violations of the Family Educational Rights and Privacy Act of 1974; and (6) injunction. After a hearing on July 2, 1975, the United States District Court for the Central District of California entered a judgment of abstention.

On July 30, 1975, petitioner filed his notice of appeal from the above judgment. He contended that the federal



action involved two issues not before the state court: the alleged denial of civil rights under 42 United States Code section 1983 and the alleged violations of the Family Educational Rights and Privacy Act of 1974, 20 United States Code section 1232g. Therefore, petitioner argued, the judgment of abstention should be reversed.

The Ninth Circuit Court of Appeals disagreed. The court found that petitioner had no private cause of action under the Family Educational Rights and Privacy Act of 1974, and that petitioner's claim of violation of his civil rights under 42 United States Code section 1983 was merely a different label for his state court libel claim. Accordingly, because the state and federal causes of action were substantially the same, identical parties were involved in both actions, and petitioner chose the state forum first, the circuit court, noting that the judgment did not affect the merits of petitioner's claim, affirmed the judgment of abstention on December 19, 1977.

It should also be noted that the state court action went to trial on October 31, 1975 and on March 4, 1976 judgment was entered in favor of all defendants on all causes of action. Petitioner's appeal from that judgment is pending at this time.

#### REASONS FOR DENYING THE WRIT

##### I. The Decision Below Is Entirely Consistent with This Court's Decision in *Colorado River*.

In *Colorado River Water Cons. Dist. v. U.S.* (1976) 424 U.S. 800, this Court held that in situations involving the contemporaneous exercise of state and federal jurisdiction not within one of the abstention doctrine categories, a federal court may refrain from exercising jurisdiction if considerations of wise judicial administration so warrant and the court has made a careful judgment considering its

obligation to exercise jurisdiction and the factors counseling against the exercise of jurisdiction. (*Id.*, at 817-818.)

This Court then proceeded to uphold the dismissal, by the United States District Court for the District of Colorado, of the government's suit seeking a declaration of its rights to certain state waters. At the time of dismissal a suit which had been filed in state court by one of the defendants in the federal action was still pending. This Court interpreted the McCarran Amendment, 43 United States Code section 666, as providing the states with jurisdiction concurrent with the federal courts to adjudicate both government and Indian water right claims. Given such concurrent jurisdiction, the court found that the McCarran Amendment's clear intent to avoid piecemeal adjudication of water rights where a comprehensive state system for such adjudication exists was the most important, but only one, of the "number of factors [that] clearly counsel against concurrent federal proceedings". (*Id.*, at 819.) The court also found "significant" the apparent absence of proceedings in the district court other than the complaint and motion to dismiss; the fact that the district court was some 300 miles away from the appropriate state court; the extensive involvement in the suit of state water rights; and the prior participation of the government in other state water division proceedings. (*Id.*, at 820.)

The holding of the court below in this case explicitly adopts the reasoning of *Colorado River*. Based on concepts of federalism, equitable principles, and considerations of wise judicial administration, the court held that "abstention" was proper because the concurrent federal and state proceedings involved identical parties and substantially similar claims, there had been no extensive proceedings in the federal court, and petitioner herein had voluntarily elected to file in the state court first. According

to *Colorado River*, the preceding factors are proper considerations for the court to weigh. The absence of extensive proceedings in the federal action was in fact one reason this Court sustained the dismissal in *Colorado River*. That the parties were identical and the claims substantially similar is reflective of this Court's concern in *Colorado River* that all claims be capable of adjudication in the state court action, as was the case after the McCarran Amendment had been construed. Furthermore, petitioner's election to file in the state court first is also a legitimate consideration. (*Id.*, at 818.) Finally, the language from *Weiner v. Shearson, Hammill & Co., Inc.* (9th Cir. 1975) 521 F.2d 817, quoted by the court below, indicates that the above factors were carefully weighed in light of principles of wise judicial administration.

Petitioner's argument that the decision below conflicts with *Colorado River* is not merely incorrect; it is also ill-conceived. It rests too heavily on the particular facts, and ignores the rationale of *Colorado River*. Petitioner appears to posit the need for an objective determination of whether abatement is appropriate in any given case. According to petitioner, abatement is justified only by the existence of "exigent factors (such as federal legislation pushing forward state jurisdiction in the matter)" or "federal judicial or legislative policy considerations" indicating a preference for state adjudication. (Petition at p. 13.) But the scheme thus presented suffers from two defects. *Colorado River* clearly upholds the use of a balancing test, and the McCarran Amendment policy was only one of a combination of factors that justified dismissal. In the court's own language,

"No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the com-

bination of factors counselling against that exercise is required." (*Colorado River, supra*, at 818, 819.)

**II. The Decision Below Does Not Conflict with the Seventh Circuit's Decision in Calvert so as to Warrant Granting Certiorari.**

In a recent decision for which this Court has granted certiorari, the Seventh Circuit Court of Appeals issued a writ of mandate ordering the district court to proceed with a suit which, with the exception of one cause of action, it had stayed in deference to a pending state court action between the same parties involving the same causes of action as those stayed in the federal suit. (*Calvert Fire Ins. Co. v. Will* (7th Cir. 1977) 560 F.2d 792, cert. granted, (January 10, 1978) 46 U.S.L.W. 3436. Calvert was a member of a reinsurance pool operated by American Mutual Reinsurance Company. Calvert attempted to rescind its membership agreement, prompting American Mutual to sue Calvert in state court, seeking a declaratory judgment that the pool arrangement was in full force and effect. Calvert answered, alleging violation of various federal and state securities laws as well as common law fraud. Simultaneously, Calvert counterclaimed for monetary damages, asserting as grounds for relief all defenses raised in its answer except Rule 10b-5 of the 1934 Securities Exchange Act. On the same day Calvert sued American in federal court seeking rescission of the pool agreement and monetary damages. The grounds for relief were those raised in its state court answer and counterclaim, with the additional assertion that American Mutual violated Rule 10b-5. American submitted a motion for abatement in the federal action which was granted as to all claims except that for money damages under Rule 10b-5. Calvert sought a writ



of mandate ordering the district court to proceed with the action. The court of appeals ordered that the writ issue.

Applying this Court's decision in *Colorado River* to the above facts, the court in *Calvert* held that the exceptional circumstances justifying dismissal<sup>1</sup> of the federal suit did not exist:

"The federal forum was not inconvenient for the parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings." (*Calvert, supra*, at 796.)

In the absence of a conflict between the decisions of the court below and *Calvert*, the mere fact that certiorari has been granted in *Calvert* is insufficient reason to grant certiorari in this case. At the risk of being repetitive, in this case petitioner selected the state forum first and identical and duplicate litigation was avoided by abstention at an early stage in the federal action. All of petitioner's claims can be resolved in the state forum and, unlike *Calvert*, piecemeal litigation was best avoided by the lower

1. That the district court's order was phrased in terms of "staying" the action was deemed an unimportant distinction by the appellate court, since the effect "was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case." (*Id.*, at 796). The district court in this case neither dismissed the action nor made any ruling on the merits. It simply refrained from exercising its jurisdiction and held the case in abeyance.

court's abstention. Analytically, both courts weighed a variety of factors, all of which were deemed appropriate considerations in *Colorado River*, in determining whether the federal court's deference to the state court was proper. That the outcome of such a "weighing" process involving different facts resulted in the decisions discussed above is not surprising and can hardly be termed a conflict between the Seventh and Ninth Circuits as petitioner asserts.

### CONCLUSION

The decision of the lower court is clearly correct. As noted by the circuit court, what the petitioner called a libel in his state court complaint in July of 1974, a year later in his federal suit he called a violation of his civil rights under 42 United States Code section 1983. Additionally, in the only different cause of action in the federal complaint regarding a claimed violation of the Family Educational Rights and Privacy Act of 1974, there is no private right of action.

For all of the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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